Supreme Court, U.S.
FILED

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NO. _____

In The
Supreme Court of the United States

OCTOBER TERM, 1996

THOMAS E. JOHNSTON

Petitioner,

versus

TIDEWATER MARINE SERVICE, TIDEWATER MARINE, INC., TWENTY GRAND OFFSHORE INCORPORATED, TIDEWATER TOWING, INC., AND PENTAL INSURANCE COMPANY

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI of Thomas E. Johnston

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QUESTION PRESENTED FOR REVIEW

Can a federal court, consistent with the Seventh Amendment, reconcile a jury's conflicting answers to special jury interrogatories by evaluating them on the basis of a legal standard not given to the jury?

LIST OF PARTIES

The following are parties to this proceeding:
Thomas E. Johnston,
Plaintiff-Petitioner

Tidewater Marine Service,
Tidewater Marine, Inc.
Twenty Grand Offshore Incorporated
Tidewater Towing, Inc.
Pental Insurance Company,
Defendants-Respondents

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The unpublished and unreported decisions of the United States Court of Appeals, Fifth Circuit and the district court are reproduced in the appendix.

JURISDICTION

This Petition, which seeks review of a judgment of the United States Court of Appeals, Fifth Circuit, entered on April 23, 1997, is timely filed pursuant to 28 U.S.C. § 2101(c). This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED IN THIS CASE

Amendment VII — Civil Trials

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

Thomas E. Johnston brought this action under the Jones Act and the General Maritime Law to recover damages for

injuries that he suffered on February 1, 1994 while working as an engineer aboard the M/V EL TORO GRANDE II. The Defendants are Tidewater Marine Service, Tidewater Marine, Inc., Twenty Grand Offshore Incorporated and Tidewater Towing, Inc. (hereinafter collectively "Tidewater") and their liability insurer, Pental Insurance Company, Ltd.

Plaintiff's claims were tried to a jury on June 12 through June 15, 1995. The trial judge denied Plaintiff's Motion for a Judgment as a Matter of Law at the close of the Defendants' evidence and submitted Defendants' claim of comparative negligence to the jury. The jury returned answers to special interrogatories finding that Tidewater was not guilty of Jones Act negligence, but that its vessel was unseaworthy. Ten percent of the fault for the accident was assigned to Tidewater, and ninety percent was assigned to Plaintiff. Plaintiff was awarded past and future lost earnings and fringe benefits, future general damages and future medicals.[1] However, he was awarded nothing for past general damages, prejudgment interest, cure, or damages for failure to provide cure. A judgment implementing the jury's verdict was entered by the district court on June 22, 1995.

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[1]The monetary awards were: (a) past lost earnings - $36,000.00; (b) past lost fringe benefits - $1,000.00; © future general damages - $100,000.00; (d) future lost earnings - $297,000.00; (e) future lost fringe benefits - $10,000.00; and (f) future medicals - $89,000.00.

Plaintiff filed a timely Motion for New Trial, which was granted in part on the issue of past pain and suffering but denied on all other issues. The judgment on the Motion for New Trial was entered on November 13, 1995, and the partial new trial was scheduled to commence on February 12, 1996. However, at a pretrial conference on that date, the parties agreed to stipulate to the appropriate measure of past general damages, eliminating the need for a jury trial of that issue. A partial consent verdict was subsequently signed by the parties and approved by the district court on May 14, 1996, declaring that Plaintiff was entitled to past general damages in the sum of $125,000.00, subject to the jury's allocation of fault and certain enumerated terms and conditions.[2]

The Partial Consent Verdict was entered as a judgment on May 17, 1996, and on June 3, 1996, Plaintiff perfected an appeal to the United States Court of Appeals, Fifth Circuit from that judgment as well as the judgments entered on June 22, 1995 and November 13, 1995. The matter was assigned to the appellate court's summary calendar, and on April 23,

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[2]The special terms and conditions were set forth in the Partial Consent Verdict included the following provision:

> "This partial consent verdict has no effect on any other issues and claims in this case, and both plaintiff and Tidewater specifically reserve the right to appeal the judgment of June 16, 1995 and the amended judgment which will be entered as a result of this partial consent verdict, except for the amount agreed to for past pain and suffering...."

1997, the judgment of the district court was affirmed in an unpublished *per curiam* decision.

ARGUMENT

The decision rendered by the respondent United States court of appeals in this case is in conflict with the decision of another United States court of appeals on the same important matter. The United States Court of Appeals, Fourth Circuit correctly concluded in *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 108 (4th Cir.1991) that "the court cannot, consistent with the Seventh Amendment, evaluate a jury's verdict based on evidence that the jury was not permitted to consider at trial or on a legal standard not given to the jury." Such an evaluation would effectively result in a new factual finding by the court. Nevertheless, that is precisely what the court of appeals did in this case.

This Court has not had occasion to address the issue of whether a federal court can, consistent with the Seventh Amendment, evaluate a jury's verdict on the basis of a legal standard not given to the jury. It is well-settled in the jurisprudence of this Court that "[w]here there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way." *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364, 82 S.Ct. 780, 786, 7 L.Ed.2d 798. However, it does not appear that the Court has ever stated whether the view of the

case must be consistent with the legal standards given to the jury.

Among other things, the jury in this case was asked to determine the amount of future medical expenses that Plaintiff was entitled to recover. Plaintiff suffered disabling injuries to his left wrist, radius and elbow as a result of a fall aboard Tidewater's vessel. Those injuries were complicated by reflex sympathetic dystrophy and moderate to severe depression. His treating physician, Dr. Darrell L. Henderson, recommended a surgical procedure for the treatment of Plaintiff's wrist injury, which Tidewater refused to authorize. Tidewater also denied Plaintiff adequate treatment for his depression by delaying payment of bills submitted by Dr. Michael Berard, a clinical psychologist.

Tidewater contested Plaintiff's need for the surgery recommended by Dr. Henderson and presented the testimony of another doctor to the effect that the risks associated with the procedure recommended by Dr. Henderson outweighed the potential benefits. In particular, Tidewater's expert opined that the surgical procedure would precipitate a recurrence of the reflect sympathetic dystrophy, which was in remission.

The jury obviously found that the surgery was necessary treatment, since it awarded Plaintiff Dr. Henderson's highest estimate of the cost of the surgery in its answer to Interrogatory No. 7. However, the jury answered "No" to Interrogatory No. 10, which reads as follows:

> "10. Do you find from a preponderance of the evidence that Tidewater Marine owes Thomas E. Johnston ***further cure*** for the injury to his arm?" [emphasis added].

Apparently, the jury construed the reference to "further cure" as an amount in addition to the cost of the surgery, which it had awarded in response to Interrogatory No. 7. In the context of explaining the concepts of maintenance and cure, the district court had given the following cautionary instruction:

> "It is important to note here that if you find the plaintiff is entitled to an award of damages under either his Jones Act or unseaworthiness claim and you include the cost of food and lodging and medical expenses in the damage award that maintenance and cure cannot be awarded for the same period of time. In other words, there can be no double recovery for the plaintiff."

The instructions following Interrogatory No. 10 informed the jury that if it answered "No" to Interrogatory No. 10, its deliberations were concluded. The jury therefore pretermitted consideration of Interrogatory No. 11, which asked whether Tidewater was unreasonable in failing to pay for the surgery by Dr. Henderson or delaying payment to Dr. Berard and whether such failure or delay caused further injury or damages to Plaintiff. It also pretermitted consideration of

Interrogatory No. 12, which asked it to assess compensatory damages for failure to provide cure.

The district court and the appellate court reconciled these conflicting answers by reasoning that the jury had found that the surgery recommended by Plaintiff's treating physician would be merely palliative and therefore did not qualify as cure. However, the instructions that were given to the jury by the district court did not provide a basis for making such a finding.

"Cure" was defined by the trial judge in his instructions, as follows:

> "The cure to which a seaman may be entitled includes the cost of medical attention, including reasonable and necessary services of physicians and nurses as well as the cost of hospitalization, medicine and medical apparatus."

Later, in the context of explaining the concept of compensatory damages, the trial judge told the jury that such damages included "the reasonable expenses of hospitalization and medical and nursing care and treatment necessarily to be so obtained in the future." The jury was never told that Plaintiff was not entitled to cure, if it found that the recommended surgery would be merely palliative. The idea that the surgery was palliative but not curative was never suggested by Tidewater in its arguments to the jury or in the evidence that it presented. It contended that the surgery was not reasonable and necessary, because the risk that it would precipitate a

recurrence of Plaintiff's reflex sympathetic dystrophy was too great. The idea that it was palliative did not arise until Tidewater attempted to defend the jury verdict in response to Plaintiff's Motion for a New Trial.

In light of the trial judge's instructions, the only finding that can attributed to the jury was that the recommended surgery was reasonable and necessary, because that was the only standard that was the jury was given for awarding cure and future medical expenses. The appellate court's contrary conclusion was explained in a footnote to its *per curiam* opinion, as follows:

> "We recognize that a formal definition of cure was not provided to the jury. However, simply using the ordinary meaning of the word cure — 'to restore to health' — the jury could have concluded that if a medical procedure was not deemed curative in nature, Johnston was not entitled to recover expenses for the procedure under a claim for maintenance and cure. WEBSTER'S NEW COLLEGIATE DICTIONARY 276 (1979)."

In view of the district court's instruction defining cure as "reasonable and necessary services of physicians and nurses as well as the cost of hospitalization, medicine and medical apparatus," it was unreasonable for the appellate court to attribute to the jury a dictionary definition of cure, which excluded expenses found to be "reasonable and necessary." This approach is contrary to the appellate court's earlier

observation that an attempt to reconcile conflicting answers to jury interrogatories "must be done 'in light of the surrounding circumstances, including the instructions of the court.'" *Davis v. West Community Hospital*, 755 F.2d 455, 465 (5th Cir. 1985)(quoting *Wright v. Kroeger Corp.*, 422 F.2d 176, 178 (5th Cir. 1970)).

This Herculean effort to reconcile the jury's answers to the interrogatories regarding future medical expenses and cure is particularly perplexing in light of the other undeniable inconsistency in the jury's answers. The district court correctly determined that a new trial had to be granted due to the jury's failure to award general damages for past pain and suffering, despite its award of past lost earnings and fringe benefits, which clearly indicated a finding that Plaintiff was injured and disabled during that period.

In *Pagan v. Shoney's, Inc.*, 931 F.2d 334, 337 (5th Cir. 1991), the appellate court declined to affirm the jury's award of special damages, leaving only the general damages to be re-tried, explaining that "[t]o limit so narrowly the scope of the new trial would be to misunderstand the nature of an inconsistent verdict." Nevertheless, in this case, the court of appeal affirmed a judgment granting a partial new trial limited to the issue of past general damages by attributing to the jury knowledge of a legal principle on which it was not instructed. In doing so, the court of appeal sanctioned a practice, which violates rather than upholds the Seventh Amendment.

CONCLUSIONS

It is undisputed that at least a partial new trial was required in this case, because some of the jury's answers to the special interrogatories were conflicting. Nevertheless, the lower courts felt constrained by the Seventh Amendment to reconcile other conflicting answers by attributing to the jury knowledge of a legal principle, which was not addressed in the jury instructions.

The United States Court of Appeals, Fourth Circuit correctly concluded in *Mattison v. Dallas Carrier Corp.*, *supra*, that evaluating a jury's verdict on the basis of a legal standard not given to it is inconsistent with the Seventh Amendment. The contrary result reached by the lower courts in this case underscores the need for guidance from this Court with regard to a federal court's duty under the Seventh Amendment. Certiorari should therefore be granted, and the judgments of the lower courts should be reversed, vacated and set aside.

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By: _____
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APPENDIX A

IN THE UNITED STATES COURT OF APPEAL
FOR THE FIFTH CIRCUIT

No. 96-30595
Summary Calendar

THOMAS E. JOHNSTON,

Plaintiff-Appellant,

versus

TIDEWATER MARINE SERVICE; TIDEWATER MARINE INC.; TWENTY GRAND OFFSHORE INCORPORATED; TIDEWATER TOWING INC.,erroneously referred to as Tidewater Marine Service Inc. & Tidewater Marine Inc.;PENTAL INSURANCE COMPANY

Defendants-Appellees.

Appeal from the United States District Court
for the
Western District of Louisiana
(94-CV-1451)

Before JOHNSON, WIENER, and DENNIS, Circuit Judges.
PER CURIAM:*

Thomas E. Johnston appeals the district court's partial denial of his motion for new trial. Plaintiff asserts that the jury's verdict contained an irreconcilable conflict. Because we

find that the district court did not err in reconciling the jury's verdict, we affirm.

I. Facts and Procedural History

Johnston filed a complaint against Tidewater Marine Service, Twenty Grand Offshore, Inc., and Pental Insurance Company (Tidewater), asserting claims of negligence under the Jones Act unseaworthiness, and maintenance and cure. These claims were tried to a jury. Throughout the trial both Johnston and Tidewater presented conflicting evidence concerning the value, nature, and necessity of certain medical procedures.

The district court submitted special interrogatories to the jury concerning each of the three causes of action asserted by Johnston. When the jury returned the verdict, they determined that Tidewater was not negligent, that the vessel was unseaworthy, and that Johnston was not entitled to cure and maintenance. In awarding compensatory damages for the unseaworthiness claim, the jury allocated $89,000 for future medical expenses.

Johnston filed a motion for new trial claiming, amongst other things, that the jury's award of future medical -expenses was inconsistent with the finding that Johnston was not entitled to maintenance and cure. The district court denied the

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* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

motion for new trial on this point stating that the jury's verdict could be reconciled when considering the large amount of evidence at trial that the treatment sought by Johnston was merely palliative and not curative in nature. Johnston now appeals the district court's partial denial of his motion for new trial.

II. Discussion

We are required under the Seventh Amendment to make a concerted effort to reconcile seemingly inconsistent answers to special interrogatories if possible. See Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines Ltd., 369 U.S. 355, 364 (1962) White v. Grinfas., 809 F.2d 1157, 1161 (5th Cir. 1987). We must attempt to reconcile jury findings before we are free to disregard the verdict. See Gallick v. IB&O R.R. Co., 372 U.S. 108, 119 (1963). This court has stated that the test used in reconciling apparent conflicts in jury verdicts is

> whether the answers may fairly be said to represent a logical and probable decision on the relevant issues as submitted, even though the form of the issue or alternative selective answers prescribed by the judge may have been the likely cause of the difficulty and largely produced the apparent conflict . . . . If on review of the District Court's judgment we find that there is no view of the case which makes the jury's answers consistent and that the inconsistency is such that the special verdict will support neither the judgment entered below nor any other judgment, then the judgment

> must be reversed and the cause remanded for trial anew.

Griffin v. Matherene, 471 F.2d 911, 915 (5th Cir. 1973) (citations omitted).

In the present case, Johnston contends that it is inconsistent to award compensatory damages for future medical expenses under a claim of unseaworthiness and then decline to find that Tidewater owed a duty of maintenance and care for those same medical expenses. We disagree. Importantly, unseaworthiness and maintenance and care are separate and distinct causes of action. See Ferrara v. A. V. Fishing, Inc., 99 F.3d 449, 452 (6th Cir. 1996); see also, Liner v. J.B. Talley and Co., Inc., 618 F.2d 327, 332 (5th Cir. 1980). A claim for unseaworthiness is compensatory in nature maintenance while a claim for maintenance and cure is curative in nature. Cf. LeBlanc v. B.G.T. Corp., 992 F.2d 394, 397 (lst Cir. 1993). Under a maintenance and cure claim, a vessel owner only has a duty to make payments for necessary therapeutic, medical, and hospital expenses until maximum cure is reached. Maximum cure occurs

> when it appears probable that further treatment will result in no betterment of the seaman's condition. Thus, where it appears that the seaman's condition is incurable, or that future treatment will merely relieve pain and suffering but not otherwise improve the seaman's physical condition, it is proper to declare that the point of maximum cure has been achieved.

Gaspard v. Taylor Diving and Salvage Co., Inc., 649 F.2d 372, 375 n. 3 (5th Cir. 1981) (citing Pelotto v. L & N Towing Co., 604 F. 2d 396, 400 (5th Cir. 1979)). Therefore, when a particular medical procedure is merely palliative in nature or serves only to relieve pain and suffering, no duty to provide payments for cure exists.[1] As stated earlier, there was a large amount of conflicting testimony during the trial about whether the medical procedure Johnston was seeking monetary damages for was curative. After looking at the evidence presented at trial, it is entirely possible that the jury that the medical procedure Johnston was seeking compensation for was merely palliative instead of curative in nature. Thus, it would have been consistent for the jury to award compensatory damages for future medical expenses under the unseaworthiness claim yet find that Tidewater did not owe Johnston a duty of maintenance and cure.

Because we agree with the district court's conclusion that the jury's verdict can logically be reconciled we hold that the district court did not err in partially denying Johnston's motion for new trial.

AFFIRMED.

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[1]We recognize that a formal definition of cure was not provided to the jury. However, simply using the ordinary meaning of the word cure--"to restore to health"--the jury could have concluded that if a medical procedure was not deemed curative in nature, Johnston was not entitled to recover expenses for the procedure under a claim for maintenance and cure. WEBSTER'S NEW COLLEGIATE DICTIONARY 276 (1979).

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

THOMAS E. JOHNSTON	CIVIL ACTION NO. §4-1451
VERSUS	JUDGE SHAW
TIDEWATER MARINE SERVICE, INC. ET AL	MAGISTRATE JUDGE TYNES

JUDGMENT

This action came on for trial before the Court and a Jury, District Judge John M. Shaw, presiding, and the issues having been duly tried, and the Court having instructed the Jury to make answer to certain special interrogatories-, and the Jury having duly rendered their verdict and having made answer to the special interrogatories as follows:

1. Do you find from a preponderance of the evidence that Tidewater Marine was negligent in the manner claimed by the plaintiff, and that such negligence was a legal cause of damage to Thomas E. Johnston under the standards given to you in regard to the Jones Act claim?

Answer Yes or No: No

(Note: If you answered "No" to Question One, skip Question Two and proceed to answer Question Three.)

2 If you answered "Yes" to Question One, do you fined from a preponderance of the evidence that Thomas E. Johnston was himself negligent in the manner claimed by

Tidewater Marine and that such negligence was a legal cause of his own damages under the standards given to you in regard to the Jones Act claim?

Answer Yes or No: _____

3. Do you find from a preponderance of the evidence that the vessel was unseaworthy in the manner claimed by plaintiff and that such unseaworthiness was a legal cause of damages to Thomas E. Johnston under the standards given to you in regard to the unseaworthiness claim?

Answer Yes or No: Yes

(Note: If you answered "No" to both Questions One and Three, skip Questions Four through Nine and proceed to answer Question Ten.)

4. If you answered "Yes" to Question three, do you find from a preponderance of the evidence that Thomas E. Johnston was himself negligent in the manner claimed by Tidewater Marine and that such negligence was a legal cause of his own damages under the standards given to you in regrd to the unseaworthiness claim?

Answer Yes or No: Yes

(Note: If you answered "No" to both Questions Two and Four, skip Question Five and proceed to answer Question Six.)

5 If you answered "Yes" to Questions Two and/or Four, what proportion or percentage of Thomas E. Johnston's damages do you find from a preponderance of

the evidence to have been legally caused by the fault of the respective parties?

Answer in Terms of Percentages:

Tidewater Marine (defendant) ---------- 10 %

Thomas E. Johnston (plaintiff) ---------- 90 %

(Note: The total of the percentages given in your answer should equal 100%.)

6 Without regard to any percentages that you may have given in answer to Question Five, state the entire amount of damages sustained by Thomas E. Johnston as a result of the accident from the date of the alleged accident to the date of trial.

A. Bodily injury, pain and suffering, disability, mental anguish and loss of capacity for the enjoyment of life ---------$ 0

B. Loss of earnings ---------- $ 36,000

C. Fringe benefits ---------- $ 1,000

7 Without regard to any percentages that you may have given in answer to Question Five, state the entire amount of damages to be experienced by Thomas E. Johnston as a result of the accident in the future after this trial.

Answer in Dollars:

A. Bodily injury, pain and suffering, disability,

mental anguish and loss
of capacity for the
enjoyment of life --------- $ 100,000

B. Loss of earnings ---------- $ 297,000
C. Fringe benefits ---------- $ 10,000

D. Medicals ---------- $ 89,000

(Note: If you answered "Yes" to Question One, or answered "no" to Question three, skip Questions Eight and Nine, and proceed to answer Question Ten.)

8. If you answered "No" to Question One and "Yes" to Question Three, do you find from a preponderance of the evidence that the plaintiff is entitled to an award of pre-judgment interest?

Answer Yes or No: No

(Note: If you answered "No" to Question eight, skip Question Nine and proceed to answer Question Ten.)

9. If you answered "Yes" to Question Eight, state the date on which you determine that pre-judgment interest is due.

Date:_____

10. Do you find from a preponderance of the evidence that Tidewater Marine owes Thomas E. Johnston further cure for the injury to his arm?

Answer Yes or No: No

(Note: If you answered "No" to Question Ten, your deliberations are concluded. Sign

and date your verdict form and return to the courtroom.)

11. Do you find from a preponderance of the evidence that Tidewater Marine was unreasonable in failing to pay for the surgery by Dr. Henderson or delaying payment to Dr. Berard, and such failure or delay caused further injury or damage to Thomas E. Johnston?

Answer Yes or No: _____

(Note: If you answered "No" to Question Eleven, your deliberations are concluded. Sign and date your verdict form and return to the courtroom.)

(Note: If you answered "yes" to Questions One and/or three, skip Quest-ion Twelve and proceed to answer Question Thirteen.)

12. If you answered "Yes" to Question Eleven, and answered "No" to both Questions One and three, what amount of compensatory damages do you find from a preponderance of the evidence to have been caused by the failure to Tidewater Marine to pay for the surgeryof Dr. Henderson or the delay on paying the bill of Dr. Berard?

Answer in Dollars: $_____

13. Do you find from a preponderance of the evidence that Tidewater Marine was arbitrary and capricious or willful, callous and persistent in failing to authorize the surgery of Dr. Henderson and/or delaying the payment of Dr. Berard?

Answer Yes or No: _____

(Note: If you answered "No" to Question Thirteen, your deliberations are completed. Sign and date your verdict form and return to the courtroom.)

14. If you answered "Yes" to Question Thirteen, state the entire amount of punitive damages, if any, to be awarded to Thomas E. Johnston as a result of defendant's arbitrary and capricious failure to authorize the payment of Dr. Henderson's surgery, and/or delaying the payment of Dr. Berard.

Answer in Dollars: $_____

SO SAY WE ALL.

IT IS ORDERED AND ADJUDGED that there be judgment herein in favor of defendants TIDEWATER MARINE SERVICE, INC., TIDEWATER MARINE, INC., TWENTY GRAND OFFSHORE, INC., TIDEWATER TOWING, INC., and PENTAL INSURANCE COMPANY, and against plaintiff, THOMAS,E. JOHNSTON, dismissing plaintiff's Jones Act claim, with prejudice, at plaintiff's costs.

IT IS FURTHER ORDERED AND ADJUDGED that there be judgment herein in favor of plaintiff, THOMAS E. JOHNSTON, and against defendants TIDEWATER MARINE SERVICE, INC., TIDEWATER MARINE, INC., TWENTY GRAND OFFSHORE, INC.,

TIDEWATER TOWING., INC., and PENTAL INSURANCE COMPANY, in the sum of FIFTY-THREE THOUSAND AND N01100 ($53,000.00) DOLLARS with interest thereon at the rate of 5.88% per annum from date of judgment until paid, and his costs of action.

IT IS FURTHER ORDERED AND ADJUDGED that there be judgment herein in favor of defendants TIDEWATER MARINE SERVICE, INC., TIDEWATER MARINE, INC., TWENTY GRAND OFFSHORE, INC., TIDEWATER TOWING, INC., and PENTAL INSURANCE COMPANY, and against plaintiff, THOMAS E. JOHNSTON, dismissing plaintiff's claim for pre-judgment interest, with prejudice, at plaintiff's costs.

IT IS FURTHER ORDERED AND ADJUDGED that there be judgment herein in favor of defendants TIDEWATER MARINE SERVICE, INC., TIDEWATER MARINE, INC., TWENTY GRAND OFFSHORE, INC., TIDEWATER TOWING, INC., and PENTAL INSURANCE COMPANY, and against plaintiff, THOMAS E. JOHNSTON, dismissing plaintiff's claim for punitive damages with prejudice, at plaintiff's costs.

Thus Done and Signed at Lafayette, Louisiana, this day of June, 1995.

ROBERT H. SHEMWELL
CLERK OF COURT
By: /s/ Ronald G. Weathers
Deputy Clerk

APPROVED AS TO FORM:

/s/ John M. Shaw
JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

THOMAS E. JOHNSTON — CIVIL ACTION NUMBER 94-1451

VERSUS — JUDGE SHAW

TIDEWATER MARINE SERVICE, INC., ET AL — MAGISTRATE JUDGE TYNES

JUDGMENT

This motion came on f or hearing before the court, United States District Judge John M. Shaw presiding, and the issues having been duly heard and a decision having been duly rendered,

It is ORDERED, ADJUDGED, and DECREED that the motion for new trial filed by the plaintiff, Thomas E. Johnston, is GRANTED in part, on the issue of past pain and suffering, and DENIED in part, on all other issues raised by the plaintiff *I*s motion for new trial.

Lafayette, Louisiana, November 9th, 1995.

/s/ John M. Shaw
JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

THOMAS E. JOHNSTON	CIVIL ACTION NO. 94-1451
VERSUS	JUDGE SHAW
TIDEWATER MARINE SERVICE, INC. ET AL	MAGISTRATE JUDGE TYNES

RULING AND REASONS FOR JUDGMENT

Now before the court is a motion for new trial filed by the plaintiff, Thomas E. Johnston, pursuant to Rule 59 of the Federal Rules of Civil Procedure, on the grounds that the jury's verdict as to damages was contrary to the law and the evidence.

The authority for granting a motion for new trial is set forth in Rule 59(a) of the Federal Rules of Civil-Procedure. Although Rule 59 does not set forth the various grounds upon which a court may grant a new trial, among the grounds commonly used are that the verdict is against the weight of the evidence, the damages are excessive, or that for other reasons the trial was not fair. Bazile v. Bisso Marine Co., Inc., 606 F.2d 101 (5th Cir. 1979); Smith v. Transworld Drilling Company, 773 F. 2d 610 (5th Cir. 1985) Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 61 S.Ct. 189, 85 L.Ed. 147 (1940).

In this case the defendant has stated two bases for his motion: 1) the jury's verdict is inconsistent and contrary to the

weight of the evidence in failing to award damages for past pain and suffering, although the jury did award plaintiff damages for loss wages and loss fringe benefits in the past, and 2) the jury verdict is inconsistent when it found that the plaintiff was not entitled to future cure, although it did award plaintiff money for future medical expenses.

On June 15, 1995, the jury returned a verdict for the plaintiff finding that the Tidewater Marine vessel was unseaworthy. The jury exonerated Tidewater Marine from liability under the Jones Act.

In answering the jury special interrogatories pertaining to damages, the jury awarded plaintiff $36,000.00 for loss of earnings in the past, $1,000.00 for loss of fringe benefits in the past, and $0 damages for bodily injury, pain and suffering, disability, mental anguish and loss of capacity for the enjoyment of life in the past.

The jury's findings of unseaworthiness, coupled with damage award for loss earnings and fringes in the past necessitates a conclusion and finding that the jury found that plaintiff was disabled from his work due to the injury. The evidence at trial clearly demonstrates a certain measure of pain and suffering accompanied the plaintiff's disabling injury in the past.

Accordingly, the jury's verdict and finding on the issue of past pain and suffering is not consistent and is not supported by the evidence, and can not stand. Therefore, a new trial is GRANTED on the issue of past pain and suffering.

With respect to the jury's verdict and finding that plaintiff is not entitled to future cure although he is given an award for future medicals, this court finds that such a finding is not inconsistent and is supported by the evidence at trial.

A large amount of evidence at trial was devoted to determining whether the plaintiff had reached maximum medical cure, and whether the treatment sought by the plaintiff, and recommended by his treating physicians, was curative in nature or merely palliative. The evidence at trial was conflicting on this issue and the jury was entitled to assess the conflicting testimony and make such conclusions and credibility decisions as it deemed necessary. This court will not substitute its own findings for that of the jury. This court-s only inquiry is to determine whether the jury's verdict is against the weight of the evidence and contrary to the law. It is not. The jury's verdict was well founded in the facts in evidence.

For the reasons stated herein the motion for new trial is GRANTED, on the issue of past pain and suffering, and DENIED, as to all other issues raised by the defendant's motion.

Lafayette, Louisiana, November 15th ,1995.

/s/ John M. Shaw
JOHN M. SHAW
UNITED STATES DISTRICT JUDGE